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The political uses of expertise in the EU decision making: the case of comitology

Cécile Robert

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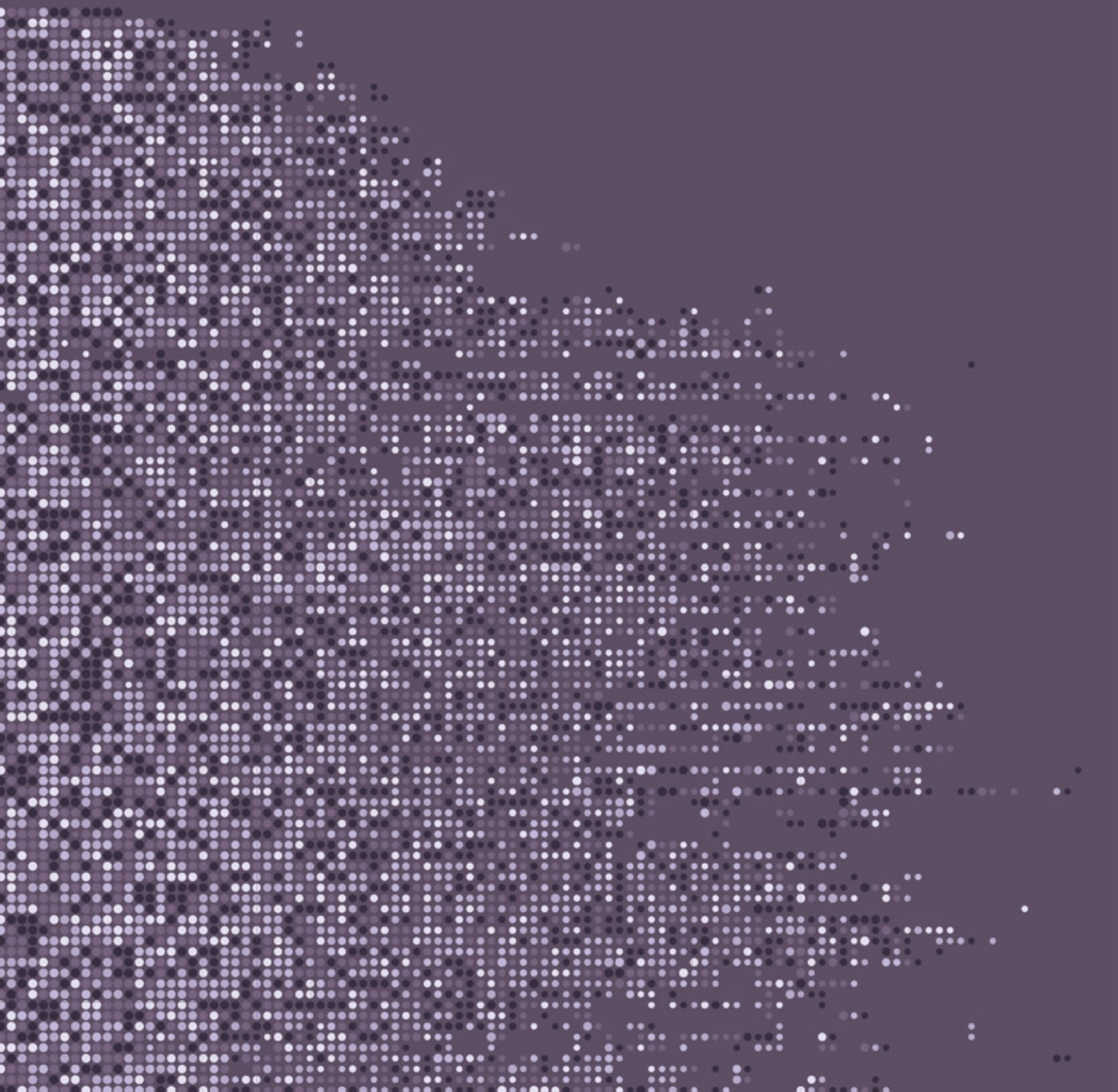
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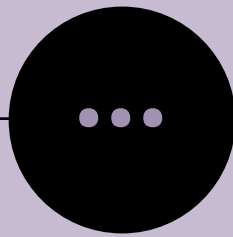
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The political use of expertise
in EU decision-making:

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May 2019

Written by
Cécile Robert
PhD, Dr Habil.
Sciences Po Lyon – laboratoire
Triangle (CNRS-Ecole Normale
Supérieure de Lyon)
cecile.robert@sciencespo-lyon.fr
00 33 6 44 04 83 82

Commissioned by
The Greens/EFA Group
in the European Parliament

Designed and layout
Rubén Aguilera / Raquel Lozano
comunica@raquelozano.es

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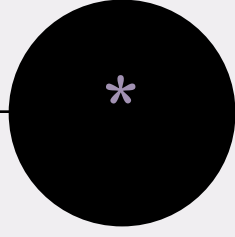
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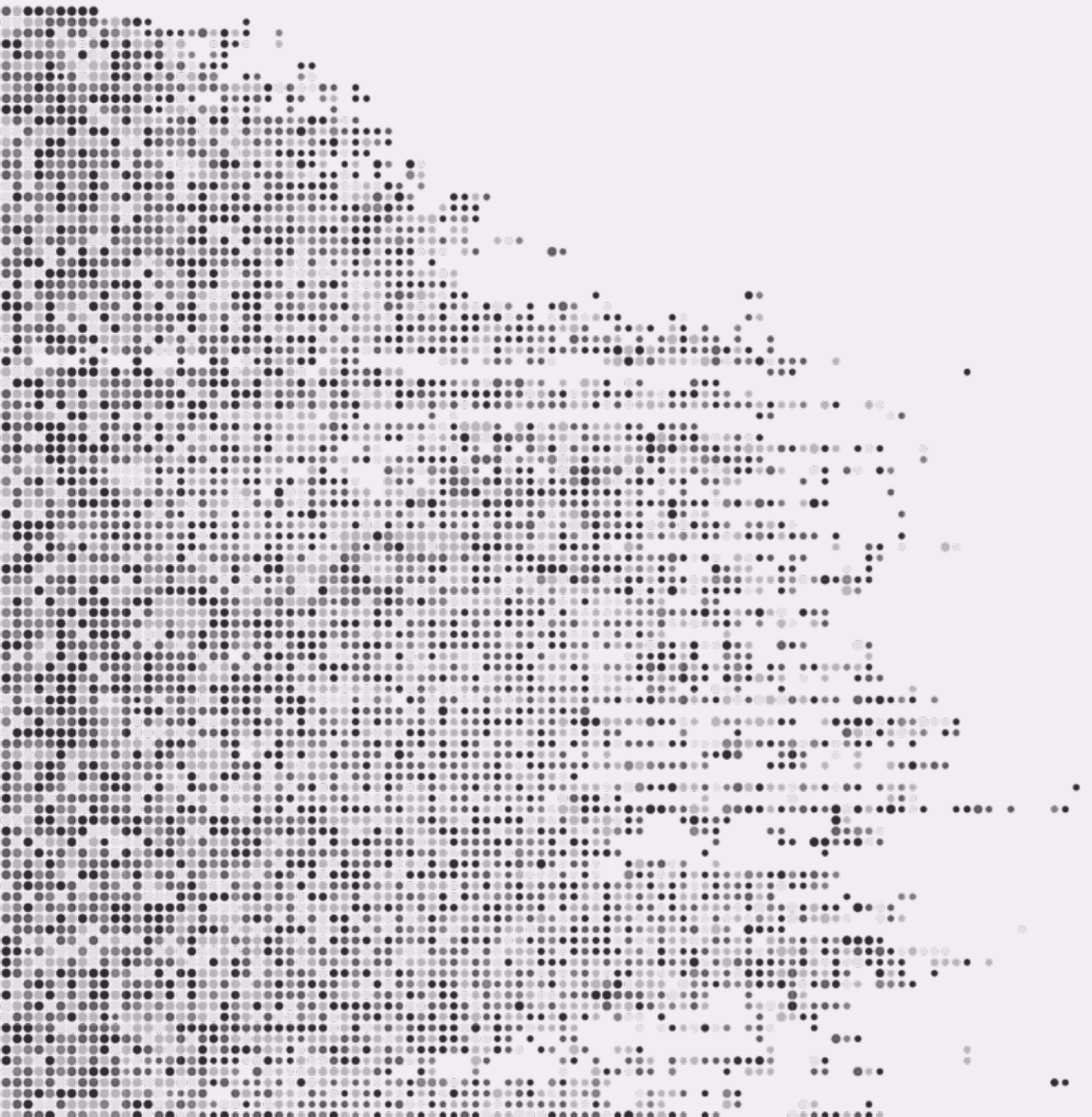
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The political use of expertise in EU decision-making:
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Introduction





PURPOSE

The purpose of this report is to highlight the instrumentalisation of technical expertise in the European decision-making process known as ‘comitology’ and to examine its effects on democracy in the European Union, particularly in light of the (currently stalled) reform of the comitology procedure.

WHAT IS COMITOLOGY?

‘Comitology’ refers to the technical procedures through which the European Commission implements EU laws once they are adopted by the Parliament and Council. Broadly speaking, before it can implement an EU legal act, the Commission must consult, for the detailed implementing measures it proposes, a committee where experts from every EU country are represented¹. Members of the EU Parliament play a very limited role in the comitology process.

In this report, “comitology” is used in a broad sense to mean all methods for producing secondary legislation, such as delegated acts, regulatory procedures with scrutiny (RPS)² and implementing acts.

BACKGROUND

The way in which decisions are taken during the comitology process has been at the centre of a series of discussions since the Lisbon Treaty came into force and has come under particular scrutiny over the last two years, particularly since the European Commission proposed to amend the way the comitology procedure works back in February 2017.

The reform of the comitology process presents us with an opportunity to identify what works and what doesn’t work in comitology procedures, particularly when it comes to transparency, democracy and accountability in EU decision-making.

Concerns with the way comitology works have been raised by MEPs because several cases of delegated or implementing acts have been identified as contradicting the very legislation they were supposed to be implementing³.

This discrepancy between the laws adopted by the legislators and the secondary acts needed to implement them has led some to question whether the law and the intentions of the legislator are properly followed through comitology. Although some have objected strongly to these concerns, the increasing number of cases has at the very least highlighted a more structural problem regarding the legitimacy of the comitology decision-making process.

This report highlights a number of cases in which, despite comitology being portrayed as purely technical, there is actually a large room for manoeuvre and a wide scope for differing interpretations

1 See European Commission Comitology Register, <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=implementing.home>.

2 The procedure was adopted in 2006 (Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (2006/512/EC), (OJ L 200, 22.7.2006, p. 11) and has not been systematically transformed into implementing or delegated acts.

3 See section I.2. below for the examples analysed.

of the legislation to flourish throughout the process. The examples call into question the way in which the boundaries between the technical and political are defined both in law and in practice, and they call for special attention to be given to the way in which this boundary between the technical and political might be instrumentalised.

In addition, the report highlights that the distinction between technical and political does not only define which areas should be covered in the comitology process (non-essential, technical elements), but it also legitimises **the way in which those decisions are taken**. The technical nature of the comitology process limits the space for democratic discussion and amplifies the role of expertise (for example, comitology revolves around expert groups and committees while diminishing the role of the European Parliament).

In summary, the comitology process raises questions not only about which issues and areas should be classified as technical but also about the way in which those technical decisions are then developed and debated. The fact that comitology procedures happen behind closed doors with a limited role for the Parliament also open up the possibility that the intentions of the legislators could be undermined via technicalities. These issues should therefore clearly be at the forefront of any future reform.

STRUCTURE AND METHODOLOGY

Several reforms of comitology decision-making are pending, ongoing or under discussion:

- The reform launched by the European Commission in February 2017 on vote counting and the publication of votes in committee⁴.
- Two Commission proposals that seek to align the old procedures that were used to adopt laws to the new procedures found in the Lisbon Treaty⁵.
- Ongoing discussions to define criteria to establish whether or not, when the co-legislators negotiate EU laws, particular aspects relating to the implementation of those laws might be clarified in comitology and whether this must be done by implementing act or by delegated act. A proposal along these lines was drawn up by the Parliament in its February 2014 resolution⁶, and the need for clarification was highlighted in the Interinstitutional Agreement on Better Law-Making adopted in 2016. Negotiations began in December 2017 and were concluded in 2019 with the adoption of a new inter-institutional agreement that, despite providing some limited clarifications, failed to introduce clear and objective criteria that would make it possible to clearly and systematically define which procedure should be followed in which cases.

4 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [COM(2017) 85].

5 Proposal for a Regulation of the European Parliament and of the Council adapting a number of legal acts in the area of Justice providing for the use of the regulatory procedure with scrutiny to Article 290 of the Treaty on the Functioning of the European Union, [COM(2016) 798]; Proposal for a Regulation of the European Parliament and of the Council adapting a number of legal acts providing for the use of the regulatory procedure with scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union, [COM(2016) 799].

6 European Parliament, Resolution of 25 February 2014 on follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers, 2012/2323(INI).

OUTLINE OF STRUCTURE

This report aims to feed into discussions on how to reform comitology in two key areas. On the one hand, the report explores the role the European Parliament plays in comitology, identifying the main obstacles and difficulties. On the other hand, it also addresses the democratic challenges posed by the way comitology currently works, as not only can it help to by-pass democratic deliberation but it can also affect the quality of the expertise used and the faith people have in the decision-making process, more generally speaking.

In section I, the report examines the distinction between the technical and political and the use made of this distinction in comitology. It emphasises that the logic behind the law (Treaties, regulations, Court of Justice of the EU (CJEU) case law) is to limit comitology and, in particular, implementing acts, to areas in which only a technical transposition of the principles adopted by the co-legislators is required.

In section II, the report demonstrates how and why the issues left to comitology – and the way in which they are addressed – are actually to a considerable extent part of a politicised interpretation and arbitration process.

Finally, in section III, the report looks at how this working method impacts the quality and legitimacy of democratic processes and decisions adopted at the EU level.

METHODOLOGY

The report is based on data and results gathered through studies carried out in recent years on the use of expertise by the Commission (Robert, 2001, 2005, 2012), the working methods of expert groups (Robert, 2010, 2013) and the role of national administrations in building European expertise (examination of expert groups involved in delegated acts) (Robert, 2016).

The report also draws on public institutional data and documents relating to comitology:

For the Parliament

- The report of 12 December 2013 on follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers, and the objections voted in plenary or only in parliamentary committees since the implementation of the 2011 regulation on comitology;

- Other available internal documents, including work by the Conference of Presidents in 2012 on a common line and horizontal approach to be adopted as regards the handling of implementing and delegated acts, and notes and reports from certain committee secretariats regarding the internal organisation needed to follow up delegated and implementing acts;
- Interviews conducted between December 2017 and January to May 2018 with group advisors and coordinators who were involved in following up objections upstream of delegated and implementing acts.

For the Commission

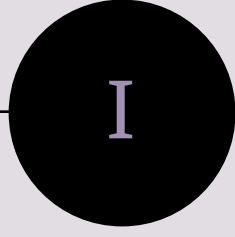
- Annual reports on the work of the comitology committees, the comitology register and register of delegated acts, the Framework Agreement on relations between the European Parliament and the European Commission of 20 November 2010 (in particular, point 15 and Annex 1), report to the Parliament and to the Council on the implementation of Regulation (EU) No 182/2011 from February 2016, Communication entitled ‘Better regulation for better results’;
- An EU agenda’ [COM(2015) 215 final], 2016 Interinstitutional Agreement on Better Law-Making, and stakeholder feedback on the proposal to amend the Comitology Regulation presented in 2017.

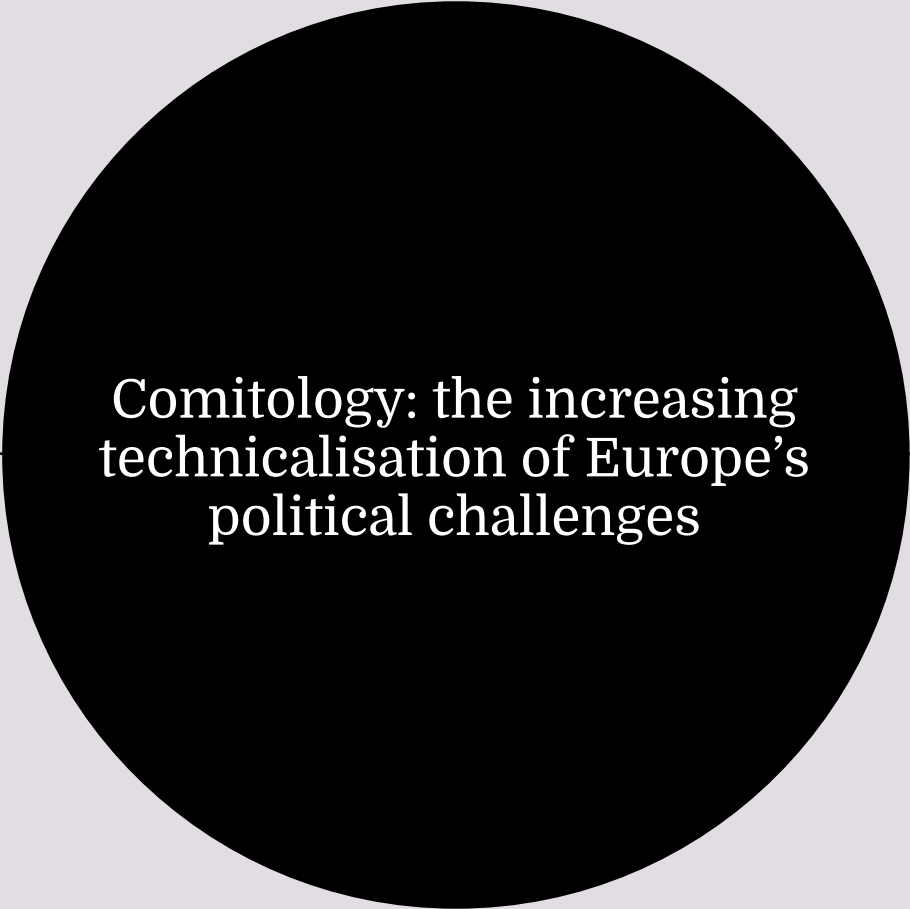
This report also draws on work carried out by a number of national institutions (legislative chambers) and the European Economic and Social Committee on comitology and developments since the Lisbon Treaty. These reports are listed in the bibliography.

Additional information was found in academic publications and reports by NGOs, think tanks and interest groups dedicated specifically to comitology or to certain decisions taken by comitology. These works are also listed in the bibliography.

It worth noting that there are a range of methods used in the parliamentary committees for monitoring comitology processes, that the nature of these monitoring practices is still somewhat unstable and that limited insight is provided by official information available on the expert groups involved in delegated acts and the comitology committees. In light of this, it would be useful if additional time and access to the bodies concerned or, at the very least, certain members of those bodies, were available in future in order to take this work further and generalise its conclusions. //

The political use of expertise in EU decision-making:
The case of comitology





Comitology: the increasing
technicalisation of Europe's
political challenges



The aim of this first section is to demonstrate that the existence of the comitology process is chiefly based on the argument that the issues covered in comitology are essentially technical, despite the original legislation often arising from important, or even essential, political priorities.

I.1. A DECISION-MAKING PROCESS JUSTIFIED BY ITS ‘TECHNICAL’ PURPOSE

Comitology was introduced in the 1960s to establish a way for the legislator to monitor the Commission’s implementation of adopted EU laws, while relieving some of the burden from the European intergovernmental negotiating process, which was too detailed and time-consuming. The way comitology works has been reformed a number of times since then⁷, although the delegation of part of the legislative work to the Commission and national civil servants in the committees is based on the same principle. The idea is that some matters may be delegated because they are basically only reliant on technical competence as opposed to the exercise of political responsibility which, in a democracy, is only carried out by representatives of the people.

It is a case of affirming the technical nature of a matter with a view to determining the type of legitimacy needed to address that matter and, thus, the stakeholders qualified to deal with it or the appropriate method for doing so.

The use of the term ‘technical’ refers to two aspects. Firstly, it denies, or at least minimises, the creative side of implementation, presenting it as solely the technical application of principles laid down in basic legislation or purely as the findings of scientists. Secondly, the claim that comitology is technical in nature results in the understanding that specialist knowledge needs to be mastered in order to address the topics dealt with. In any case, the strictly political legitimacy of representatives appears to become superfluous and, in certain cases, even inadequate. From this point of view, comitology is aligned with the idea of the growing technicalisation – and de-politicisation – in the functioning of the European Union (Robert, 2005).

Under the current comitology procedure⁸, this increasing technicalisation is enabled by two complementary methods that serve to share out the powers over ‘European matters’ between the institutions. For “delegated acts”, an initial delegation of powers to the Commission is given, but with a right of veto for the co-legislators (Parliament and Council) in accordance with Article 290 TFEU. Its legitimisation is based on the nature of the acts in question, which are supposed to concern ‘non-essential elements of a legislative act’, with the legislative act itself expressly defining the ‘objectives, content, scope and duration of the delegation of power’.

7 The first advisory committee was introduced in the area of competition policy in 1962. The first general text on comitology dates back to 1984 and was followed by a Council Decision of 1987, which laid down the four procedural principles (Declaration (No 1) on the powers of implementation of the Commission, Single European Act, Final Act (OJ L 169, 29.6.1987, p. 24). Decision 1999/468/EC renamed these the advisory, management, regulatory and safeguard procedures. Finally, Decision 2006/512/EC added a fifth procedure called the regulatory procedure with scrutiny (RPS). This was then followed more specifically by the reforms introduced under the Lisbon Treaty. For a precise timeline of these reforms, see Bergström, 2005; Maiscoq, 2010.

8 Set out in Articles 290 and 291 of the Lisbon Treaty (Treaty on the Functioning of the EU – TFEU) and in Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

In the case of “**implementing acts**”, a second delegation of powers to the Commission⁹ and to those who supervise it (i.e. the civil servants of national administrations) establishes a somewhat different division of tasks, with a right of **scrutiny** given to the co-legislators. Nevertheless, its legitimacy is based on denying the political nature of what is delegated. In accordance with Article 291 TFEU, implementing acts must be limited to clarifying the arrangements for legally binding Union acts with the sole purpose of ensuring that they are uniformly implemented in all EU Member States.

The Court of Justice of the European Union (CJEU) has consistently reaffirmed the principle of the delegation of powers on account of the technical – and not political – nature of the matters being addressed in its extensive case law on comitology. Indeed, as early as 1992, the CJEU emphasised in its judgment, in *Germany v Commission*, that provisions intended to ‘give concrete shape to the fundamental guidelines of Community policy’ must be considered ‘essential within the meaning of the Treaty’. In other words, the interpretation work completed in comitology may not cover very general principles but must apply to law that is far more precise, thereby leaving less room for manoeuvre or scope for creating legislation.

More recently, and in a more explicit way, the Court (Grand Chamber) highlighted in a judgment from 2012, in *Parliament v Council of the European Union*, that provisions ‘which, in order to be adopted, require political choices falling within the responsibilities of the EU legislature’ are ‘essential’ elements that may not be the subject of delegation.

The European Parliament has also tried on many occasions to propose an interpretation of the principles enshrined in the Treaty on the Functioning of the EU (TFEU) in order to extract criteria that would enable a decision to be made at the time a legislative act is adopted to define the matters that should be addressed in the basic act and matters to be covered by the delegated or implementing act. In particular, this meant finding a basis in the Lisbon Treaty to defend its position during co-decision procedures. Parliament took the view that those procedures too often took the form of inter-institutional negotiations. This left the Parliament at a disadvantage vis-à-vis the Commission and, in particular, the Member States, which systematically gave preference to implementing acts as a way of entrusting comitology committees with the important aspects of the negotiations.

With this in mind, Parliament drew up a series of criteria in its 2013 own-initiative report (European Parliament, 2013, 2014), which it has since been attempting to have accepted and supported by its partner institutions, albeit with limited success, given that the adoption of the new inter-institutional agreement in 2019 on the criteria for choosing between delegated or implementing acts only managed to introduce minimal clarifications. The Parliament’s position has essentially been to streamline the use of implementing acts – in particular in favour of delegated acts over which Parliament has more influence – and its proposed criteria shed light once more on the opposition between the technical and the political, highlighting that the latter may not be dealt with through comitology. On several occasions, the wording therefore attempted to clarify what is to be understood as ‘political’, highlighting in particular that this implies a degree of creation, allowing arbitration and preferences to be expressed: ‘Implementing acts should not add any further political orientation and the powers given to the Commission should not leave any significant margin of discretion’.

9 Or in very specific cases (referred to in Articles 24 and 26 of the Treaty on the European Union – TEU) to the Council.

In this report, it is only possible to briefly mention the reasons why increasing technicalisation is taking on the role of a legitimisation strategy. Indeed, comitology is notably only one aspect in the workings of the EU where the argument that an issue may be technical allows responsibility to be entrusted to non-elected parties. There are various factors behind this growing technicalisation – namely the way in which political actors, particularly at the national level, are perceived; the need for the decision-making processes to be fluid by entrusting officials with day-to-day management; the common trust in science and expertise, not only as a means to facilitate decision-making but also as a source of legitimacy (Robert, 2017).

The distinction between the technical and political is an essential element in legitimising comitology, its boundaries (the issues covered by it) and the way comitology works (the parties ultimately involved in it). This distinction is at the heart of the laws governing it and is a key part of the arguments of those who negotiate the conditions for implementing it. However, in reality, it is also a principle that is as flexible as it is vague and it is susceptible to various interpretations, which allows very different uses to be made of the boundary between technical and political.

As there are no truly objective rules allowing this boundary to be set once and for all (and given that it is an issue that the institutions compete over, since it determines the place of each institution in the decision-making process), the boundary is far from watertight. As we will see below, there are numerous political challenges involved when it comes to comitology – a process that is often political both in terms of the matters it covers and in terms of how those matters are dealt with, and by whom.

I.2. HOW ARE THE MATTERS DEALT WITH IN COMITOLGY POLITICAL? CRITERIA AND CASE STUDIES

The political nature of the matters dealt with in comitology is not always immediately apparent. In particular, this is due to the technical nature of the matters in question - both from an institutional and sometimes scientific perspective, or to their lower profile and minimal media coverage and, above all, to the sheer number of matters being handled. By way of illustration, 1,448 implementing acts were adopted in 2016, and 116 via regulatory procedure with scrutiny (RPS). Since 2009, this figure has varied between 1,148 implementing acts (in 2016) and 2,091 implementing acts (in 2009), and 116 RPS (in 2016) and 171 RPS (in 2013) each year. Finally, 763 delegated acts have been adopted and/or drawn up (under negotiation) since 2010¹⁰. These numbers confirm the important role played by comitology in defining the EU's legal and regulatory environment, and consequently in affecting the everyday lives of Europeans.

Due to the growing criticism, particularly from NGOs, of comitology¹¹ and lobbying on topics that are sensitive in the eyes of the public, several cases have gained a greater profile and some have even attracted media attention. The interest in these cases stems from two main issues: first, the fact that they perfectly demonstrate the room for manoeuvre that basic acts allow the Commission and expert groups or comitology committees in terms of supplementing the legislation they are supposed to implement; and second, the political challenges raised by what is actually 'supplemented' through the comitology process. What has alarmed observers and perpetuated the perception that such decisions are problematic is the fact that they appear to run counter to the principles laid down in the basic acts.

10 Figures taken from the Commission's annual reports on committee proceedings (for implementing acts and RPS) and the register of delegated acts.

11 For slightly different, even opposing, reasons on the part of Member States and the Parliament.

Although it is not essential for there to always be a ‘political’ side to comitology, this ‘difference’ between the intentions of the legislator and the results of the implementing or delegated acts is, however, a good indicator. The cases examined below highlight, firstly, the importance of the translation work performed by the Commission and its expert groups or committees. Secondly, they show that decisions taken under that procedure are subject to choice, even when based on scientific knowledge. In other words, in the following situations, even where there is consensus over an expert opinion, decisions always extend beyond a strictly scientific discussion. Decisions involve arbitrating between interests, principles, values and disputes that may be different, even contradictory, while striking a balance, all of which is characteristic of political work in a democracy. Thirdly, the cases also have important and potentially differing consequences for European citizens, which justifies considering them as fully political.

These three criteria that can be used to indicate the political nature of a decision are particularly visible in the examples presented below, although they only represent some of the situations in which comitology has entailed decisions and work of a strictly political nature.

CASE STUDIES

An initial series of case studies concerns **draft delegated acts** that have been challenged more or less successfully by one or both of the co-legislators in recent years.

This first example in chronological order relates to **consumer law and, more specifically, legislation on labelling** as laid down in Regulation (EU) No 1169/2011¹². Under this regulation, all ingredients that are constituents of a product must be labelled, including those derived from engineered nanomaterials. The delegated act proposed by the Commission in 2013 suggested not to regard certain nano-sized ingredients, particularly additives, as engineered materials and therefore to exempt them from labelling. Notably, the risk of confusing consumers over the difference between ‘nano’ and ‘new’, when the products in question were not new, was the justification for proposing this exemption. However, such a decision would have led to most additives being exempt from labelling. This ran counter to the principle of the basic act, which was to inform consumers about all the ingredients present in food. This resulted in Parliament opposing the act in its Resolution of December 2013¹³, as well as an objection from France in January 2014.

12 Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers as regards the definition of ‘engineered nanomaterials’.

13 European Parliament resolution on the Commission delegated regulation of 12 December 2013 amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers as regards the definition of ‘engineered nanomaterials’ (C(2013)08887– 2013/2997(DEA)).

In a similar vein, Parliament lodged an objection to the **draft Commission delegated regulation on health claims on foods** in July 2016¹⁴, which allowed industry to claim that the consumption of sugary and caffeinated drinks increased alertness and concentration. The justification for Parliament's objection was that such a provision violated the principles of European legislation in this area according to which claims may not be ambiguous, misleading or encourage excessive consumption of a foodstuff (in this case, sugar).

Finally, the delegated acts by which the **reform of the Common Agricultural Policy was largely implemented** led to several objections from Member States on account of 'outright misappropriations of the wording of the basic act and the intention of the European legislator'¹⁵. In their joint paper of 8 November 2013, Member States referred to various standard situations in which draft delegated acts had introduced aspects not provided for in the initial legislation or that even contradicted the basic act, including:

- 'the addition of eligibility criteria not provided for'
- 'a reduction to the scope of the provisions adopted'
- 'an optional system made compulsory' (or, on the contrary, in the case of the wine sector, criteria for organic farming used to calculate planting rights made optional through an implementing act)
- 'the addition of new criteria' (in the case of support for young farmers, aid made such that it may only be paid to farmers working in their own name, thereby excluding farmers working together in other legal forms).

A second group of examples concerns **regulatory procedures with scrutiny**, some of which have attracted considerable media attention in recent years.

In December 2013, Parliament passed a resolution rejecting a **proposal for a regulation concerning the status of paper within the recycling chain**. The first version of the proposal immediately gave 'end-of-waste' status to used paper. In other words, it removed any obligation for used paper to be recycled, including packaging such as 'TetraPak' which also contain, for example, aluminium or plastic. It also allowed used paper to be removed from the scope of European legislation on waste management. MEPs raised a veto based on the fact that the 'end-of-waste' status given to used paper contradicted the definition of recycling found in the Waste Framework Directive, which encompasses the reprocessing and not just the recovery of waste¹⁶.

The second case gained greater visibility due to the scandal surrounding Volkswagen that had emerged a few months earlier¹⁷. For the purposes of supplementing the 2007 Euro 6 **Regulation on**

14 European Parliament resolution of 7 July 2016 on the draft Commission regulation amending Regulation (EU) No 432/2012 establishing a list of permitted health claims made on foods, other than those referring to the reduction of disease risk and to children's development and health (D44599/02 – 2016/2708(RPS)).

15 Member State joint paper of 8 November 2013 quoted in: Sénat (2014), 'The position of delegated acts in European legislation', information report by Mr Simon Sutour on behalf of the European Affairs Committee, No 322 (2013-2014) – 29 January 2014, p. 25 et seq.

16 European Parliament resolution of 10 December 2013 on the draft Council regulation on defining criteria determining when recovered paper ceases to be waste pursuant to Article 6 (1) of Directive 2008/98/EC on waste (D021155/01 – 2012/2742(RPS)).

17 For systematically underestimating emissions of pollutants from its vehicles upon leaving the factory via *ad hoc* technical protocols between 2009 and 2015.

motor vehicle emissions¹⁸, a decision was adopted in comitology in autumn 2015 (notably in the Technical Committee on Motor Vehicles – TCMV). This allowed manufacturers to delay their compliance with the new rules for a certain period of time plus the possibility of exceeding that new nitrogen dioxide emissions limits¹⁹, despite the fact that emissions levels were supposed to be reduced by the original legislation. The Commission defended its proposal by indicating that it came on the back of an amendment made in spring of that year to the method for measuring emission rates (incorporating real-world driving conditions and not only test bench measures), which was *de facto* more stringent. The ‘Dieselgate scandal’ ultimately led to the establishment of a specific inquiry committee in the European Parliament, which concluded in February 2017²⁰ that ‘The introduction and application of conformity factors at the agreed levels could be considered a *de facto* blanket derogation from the applicable emissions limits for a considerable amount of time and thus run counter to the aims and objectives of the basic Regulation (EC) No 715/2007, given that the established conformity factors not only reflected the measurement uncertainty of PEMS, but also were further adapted to the demands for more leniency by Member States and car manufacturers, without technical justification’.

The final case relates to **endocrine disruptors**. Two laws, one of which was adopted in 2009 and concerned pesticides²¹ and the other, passed in 2012, concerning biocides²², were conditional for the purposes of their application on endocrine disruptors being defined so that products containing them could be withdrawn from the market. The Commission proposed an initial definition in 2016, after being found by the CJEU in late 2015 to have taken too long to adopt a definition – following complaints from several Member States, including Sweden. This took the form of a delegated act for biocides legislation and regulatory procedure with scrutiny for pesticides. Although the very principle of comitology and the basic acts in question gave the European administration considerable freedom in defining endocrine disruptors, one of the aspects of its proposal nevertheless very quickly met with strong opposition, leading Parliament to reject the definition in September 2017. At the request of the chemical industry in particular, the definition excluded pesticides that worked precisely by modifying the endocrine system of the target animals from the category of banned endocrine disruptors. The clause was described by MEPs opposed to the law and by the Parliament’s legal service as an ‘abuse of power’ by the Commission, which, by introducing exceptions to the basic act, was amending ‘essential elements’ of it²³.

Finally, **implementing acts** also provide examples illustrating the political challenges associated with comitology.

18 Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information.

19 That is, authorisation of 110% until 2019 for new vehicles and then 50% from 2020.

20 Report on the inquiry into emission measurements in the automotive sector (2016/2215(INI))

21 Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market.

22 Regulation (EU) No 528/2012 of the European Parliament and of the Council concerning the making available on the market and use of biocidal products.

23 European Parliament resolution of 4 October 2017 on the draft Commission regulation amending Annex II to Regulation (EC) No 1107/2009 by setting out scientific criteria for the determination of endocrine disrupting properties (D048947/06 – 2017/2801(RPS)).

Implementing acts have attracted more attention from the media, and to a lesser extent from public opinion, as a result of the intensity of the challenges and political controversies surrounding these procedures, which contrast starkly with the purely consultative opinion of the Parliament. They have also highlighted the difficulty that Member States have in finding agreement on the subjects in question. As a result, the Commission has been left to assume sole responsibility for decisions for which there is little consensus, despite the lack of consensus indicating, in particular, that there is fundamental disagreement over the types of policies (environmental, agricultural, industrial, commercial) that Member States wish to pursue and defend at the European level. Consequently, media coverage has frequently highlighted how Europeans and their elected representatives have found themselves powerless or in difficulty when it comes to having their concerns listened to on topics that are in fact highly controversial.

The authorisation procedure for genetically modified organisms (GMOs) and glyphosate are a case in point. As stated by the Commission in its February 2017 press release²⁴ on the comitology reform proposal, in 2015 and 2016 the Commission was required to make decisions about such authorisations on its own on 17 occasions²⁵ due to the lack of a clear majority among Member States. Sixteen cases related to GMOs and one to glyphosate.

In the case related to glyphosate, the Commission reauthorised one product in December 2017²⁶ which had been the focus of a series of scientific controversies, notably between the European Food Safety Authority with its favourable opinion and the International Agency for Research on Cancer (associated with the World Health Organization – WHO), which had highlighted carcinogenic risks linked to the substance. Other controversies arose from a European Citizens’ Initiative signed by more than 1.3 million Europeans calling for glyphosate to be banned, and a non-binding European Parliament resolution (which received 355 votes in favour, 204 votes against (and 111 abstentions) in the autumn. These many indications of disagreement show more broadly the lack of consensus, including scientific consensus over the issue, the importance that Europeans and their representatives attach to the consequences of such decisions and, therefore, the political dimension of the work entrusted to the Commission and its committees in the case of implementing acts.

The situation is similar in the case of GMO authorisations, with Parliament having lodged more than 36 objections since December 2015²⁷. The series of decisions under which substances are authorised and for which the basic acts gave the Commission and its committees the freedom to decide gives rise to arbitration that is all the more essential as it is taking a single direction. Each decision amounts to arbitration between economic and environmental priorities represented by stakeholders with different – even

24 European Commission – Press release: ‘Comitology: Commission proposes more transparency and accountability in procedures for implementing EU law’, Strasbourg, 14 February 2017.

25 During that period, there were also an additional 12 acts that were adopted by the Commission on its own as it had not been possible to obtain a majority in the appeal committee before 2015.

26 Commission Implementing Regulation (EU) 2017/2324 of 12 December 2017 renewing the approval of the active substance glyphosate in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011 (Text with EEA relevance, C/2017/8419).

27 36 as of 28 March 2019, for example, see: European Parliament resolution on the draft Commission implementing decision authorising the placing on the market of products containing, consisting of, or produced from genetically modified soybean pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council on genetically modified food and feed (D051971 - 2017/0000(RSP)) or European Parliament resolution of 16 December 2015 on Commission Implementing Decision (EU) 2015/2279 of 4 December 2015 authorising the placing on the market of products containing, consisting of, or produced from genetically modified maize NK603 × T25 (MON-00603-6 × ACS-ZM003-2) pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council (2015/3006(RSP)).

contradictory – interests, with an ability over the long term to reinforce certain practices or types of agriculture over others. For example, considering GMOs a type of efficient technology able to increase productivity or, on the contrary, posing too many risks (environmental, social) compared to its advantages.

Furthermore, although issues relating to GMOs and endocrine disruptors were given considerable visibility due to the lobbying of several NGOs and citizen involvement, other challenges of a political nature were also addressed by implementing acts. This is true, for example, in the case of **phthalates and, in particular, dioctyl terephthalate (DEHT)**, a substance used in the manufacturing of soft PVC, which poses serious risks to workers and, in particular, pregnant women due to the disruptive effect on reproductive systems. DEHT was initially authorised by way of an implementing act, despite the potential risks, as it offered greater benefits (theoretically a difficult product to replace, a challenge to recycle in the sector concerned, etc.). Parliament questioned this arbitration in a resolution, providing new information concerning the expert scientific studies of the substance carried out by the European Food Safety Authority (EFSA) and the existence of substitutes²⁸. This new information was aimed at arguing against the authorisation of the product as the European Parliament took a different stance when it came to weighing the different interests (between the economic advantages of DEHT and its adverse effect on human health and the environment).

The final cases we wish to highlight demonstrate that the political dimension of comitology is not only linked to balancing risks such as those seen in relation to authorisation procedures. As previously stated with regard to the Common Agricultural Policy (CAP), the different stages in the implementation of European programmes, whether done via delegated or implementing acts, assume that interpretation work is carried out involving choices that can, at times, be extremely significant. This was the case, for example, with the **Development Cooperation Instrument (DCI)**. During the negotiations for the 2014-2020 programme, it was decided that all geographical expenditure should be covered under development aid, as expressly requested by Parliament in particular. However, this provision did not prevent a special programme from being set up – via an implementing act – for the reintegration of migrants returned to Afghanistan, Pakistan or Bangladesh from Europe, which, according to the definition from the Organisation for Economic Co-operation and Development (OECD) used by the EU, must be categorically excluded from development aid²⁹.

In another area, namely **anti-dumping procedures**, Parliament's attempt to oppose an implementing act adopted by the Commission in August 2013 revealed once again the room for manoeuvre offered by these procedures and the fact that the provisions adopted could change the meaning of the basic act or even have the opposite effect. In June 2013, the Commission adopted an anti-dumping procedure against China regarding solar panels in order to protect the sector in Europe. In accordance with that procedure, it then negotiated a specific undertaking enabling exporters who agreed to a certain price level to be exempt from that procedure³⁰. However, European manufacturers made it clear, albeit in vain, that the price level set by the undertaking was far too low to protect them, thereby running counter to the objective of the basic act.

28 European Parliament resolution of 25 November 2015 on draft Commission implementing decision XXX granting an authorisation for uses of bis(2-ethylhexyl) phthalate (DEHP) under Regulation (EC) No 1907/2006 of the European Parliament and of the Council (D041427 – 2015/2962(RSP)).

29 Where those returned are not doing so 'voluntarily'.

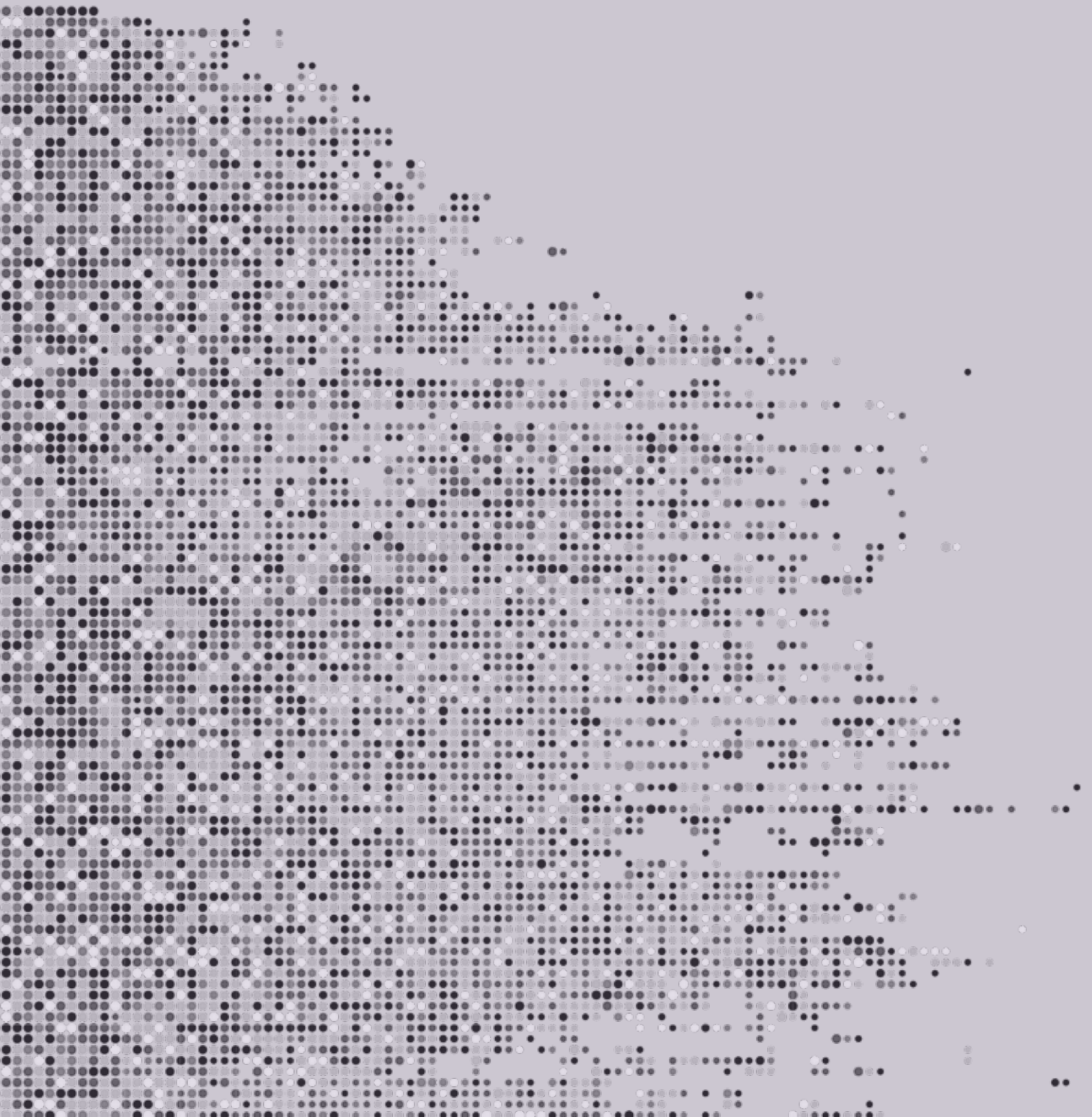
30 Commission Decision of 2 August 2013 accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China.

To conclude this section, we would highlight that the cases referred to are by no means an exhaustive list. First, matters of a political nature are not limited to those that are overtly contentious or which attract media attention. As demonstrated by some of the aforementioned cases, it is quite possible for highly political choices to be made through agreement or without any objection to them being reported. Second, even if matters attract the attention of the media due to mobilisation in particular over environmental issues or the increased transparency of procedures, this is not the only indication or reason for comitology taking on a political nature.

This section has shown how the development of delegated legislation via comitology is an activity with a political dimension that varies according to the subject matter addressed. The additional elements building upon the basic acts are never entirely dictated by purely legal or scientific considerations. **Arbitration (between interests, values etc.) is needed in order to draw up those laws and that arbitration can, in turn, influence, or even transform, the ultimate effects of the legislation in question.** At this point, we need to identify some of the reasons why the political challenges raised in comitology seem to have intensified.



Why does comitology address
political concerns?
Structural and cyclical causes



There are three complementary aspects of comitology that help to explain why decisions via comitology involve political work. The first relates to the way in which the issues to be dealt with via comitology are defined; the second relates to the discussion and decision-making processes; and the third revolves around the mechanisms for producing and selecting know-how.

II.1. COMITOLGY MADE POLITICAL BY ITS BOUNDARIES: A CONSEQUENCE OF VAGUE CRITERIA AND COMPETITION BETWEEN INSTITUTIONS

There are various aspects that result in comitology moving further away from the realm of technicalities. First, no issues are inherently of a purely technical or political nature. Moreover, there is no objective method for locating the boundary between what is covered by one or the other. In other words, the matter of where the boundaries lie between basic acts and delegated legislation, or between implementing and delegated acts, is a political issue in and of itself. This is the case wherever there is no obvious or natural answer, so that arbitration is needed to decide what the legislator should determine and what can then legitimately be entrusted in a controlled manner to the Commission and/or expert bodies (agencies, committees, etc.).

However, the arbitration process whereby the powers of the executive and legislators over each law should be determined is precisely what was – at least partially – bypassed or avoided by negotiators during the Lisbon Treaty. As stated by Hofmann (2009), there were arguments during the negotiations about various ways of envisaging this distribution of powers over delegated legislation. They are reflected in the – very different – terms by which the criteria defining implementing acts, on the one hand, and delegated acts, on the other hand, are expressed.

Whereas Article 290 TFEU describes delegated acts in terms of consequences ('non-legislative acts of general application [which] supplement or amend certain non-essential elements of the legislative act'), implementing acts are defined in Article 291 TFEU in terms of their functions ('where uniform conditions for implementing legally binding Union acts are needed'). As both definitions are not written in the same terms, they are not mutually exclusive and do not allow a clear distinction to be made between one or the other, and/or between what is covered by basic acts and what may be left to delegated legislation. The Council and Commission in particular refused to try and clarify these criteria, believing an inter-institutional agreement on the matter to be impossible (Brandsma, Blom-Hansen, 2012; Christiansen, Dobbels, 2012). In other words, **since the negotiators of the TFEU avoided resolving these ambiguities and clarifying the matter politically, these ambiguities emerge at each trilogue negotiation on new legislation.**

Given that the criteria are very vague and allow considerable scope for interpretation, how and on what basis are the boundaries between basic, delegated and implementing acts defined in reality? Generally speaking, the strategies adopted by negotiators combine two aspects. First, the will to adopt an act, even if vague on certain aspects later entrusted to comitology. Second, each of the three institutions endeavours to safeguard its powers (Héritier et al, 2013). Consequently, the Commission tends to prioritise delegated legislation, as it is more able to influence its development.

The Commission has faced criticism on a broad front in this regard. Since the beginning of the decade, the national parliaments of several Member States have criticised the growing number of topics covered by comitology (which they no longer have a hold over), as they believe this undermines their power of scrutiny³¹. In its various opinions and its 2013 report on comitology, the European Economic and Social Committee (EESC, 2013) also expressed concerns over the growing frequency with which the Commission resorted to delegated acts to address matters that it considered to be covered by basic acts. Although the Council and Member States could make the same criticism of the Commission, they have gladly sided with it and prioritised implementing acts, in particular preferring them systematically to delegated acts³². Parliament – which only has a limited right of scrutiny over implementing acts that it is not always comfortable exercising – tends to prefer delegated acts. However, the balance of power does not allow this as often as it would like. As seen in various statements by MEPs who have followed trilogue negotiations, it is not uncommon for prioritisation of an implementing act over a delegated act to be one of the concessions requested by the Council and/or Commission in exchange for taking into account one of the positions backed by MEPs.

The different institutional rationales are therefore channelled through comitology and the choice of the type of act is a variable that can depend on the outcomes of negotiations. In addition, there is also a trend for negotiators from across the institutions to use comitology to postpone part of the negotiations until delegated or implementing acts are drawn up. This may be done due to time pressure (when trilogue negotiations have already lasted too long), to other negotiators (when the Commission or Council make their agreement on other aspects of the basic act a condition), and/or due to fear that the entire negotiation will be undermined because of disagreement over certain aspects. Paradoxically, some of the most contentious cases for arbitration are sometimes therefore entrusted to comitology³³.

What are the consequences of working in this way? By adopting a definition that is deliberately vague and easily altered, combined with the logic of negotiations and the aforementioned competition between the institutions, some essential aspects of European legislation that are decisive in terms of their far-reaching impacts are in fact developed by the Commission and, most frequently, by way of implementing acts (i.e. with Parliament's basic right of scrutiny). By way of illustration, 763 delegated acts have been adopted or prepared since 2010, whereas the number of implementing measures adopted each year is between 2,091 (in 2009) and 1,148 (in 2016), with around 100 measures adopted annually under RPS.

31 In this regard, see the report by the French Senate (Sénat, 2014) mentioning, in particular, the positions adopted by the German Bundesrat, the Austrian Bundesrat and Nationalrat, the UK House of Commons, the Italian Senate and the Polish Sejm. These positions can be found at www.ipex.eu (Platform for EU Interparliamentary Exchange).

32 In this regard, see Parliament's own-initiative report on comitology and associated studies by the parliamentary committees of December 2013.

33 As explained by one of the people interviewed for this study, comitology decides precisely those matters that were too contentious or too political to be resolved during the negotiations of the basic act. 'The official argument was essentially that, i.e. it's a technical matter and not for discussion by Parliament or the Council. The unofficial argument is, 'we don't have the time'. It's a text which has taken three years to negotiate in trilogue, totally unheard of. But there are subjects which are at such a political impasse they prefer to evade the issue than block the law. Which is quite dangerous.'

II. 2. COMITOLGY MADE POLITICAL DUE TO THE WAY IT WORKS: EXPERT GROUPS AND COMMITTEES AS ARENAS OF INFLUENCE

Comitology is also a place of political negotiation precisely because the subjects covered by delegated legislation may involve important challenges and because the basic acts may allow considerable scope for interpretation in order to address those challenges. In other words, comitology is seen by institutional and private sector stakeholders as a place not only for purely technical discussions but also as a space for EU public policy formation where they can assert their own interests. The way these stakeholders envisage – and participate in – the negotiations is visible in the way the committees are formed, in particular by influencing the choice of experts. These different aspects offer a second explanation as to why comitology may be a place where decisions of a political nature are taken.

Comitology in a broad sense has long been seen by Member States and the private sector as a place where influence is exerted. This is true for national administrations that have seen comitology as a privileged forum for discussion with the Commission since the 1990s. As various works have shown (Fernández Pasarín, 2016; Robert, 2016), the attention that national administrations dedicate to committee proceedings varies greatly depending on the Member State, public policy area concerned and the matter under negotiation. Nevertheless, the committees are seen as an essential point of entry where national interests are at stake (Dehousse et al, 2013), especially as action can be taken discretely due to the lack of transparency that, until recently, existed within the committees.

Active lobbying of the comitology committees by private stakeholders is less well-known but is an important phenomenon nonetheless (Wettendorf et al, 2014), and it appears to have increased over the last decade. A number of specialised training courses are offered by and for lobbyists in Brussels in order³⁴ to clarify the challenges of comitology, evidence of the interest among private sector stakeholders in what plays out in comitology and their belief that they can and should influence this stage of EU policy formation. Although lobbyists are not formally members of the committees they can nevertheless keep abreast of the discussions and even contribute to them in various ways. This can be seen in many of the case studies referred to earlier, in particular, the flagship case study concerning the car industry and legislation on greenhouse gas emissions. In certain cases, national administrations may initially take on the role of backing and representing certain business sector or industry stakeholders, particularly to defend national industry champions and the jobs they account for. Lobbying of committee members by private stakeholders is not only addressed to national officials but also to representatives of the Commission who, like their counterparts in the Member States, may be sympathetic to a given type of argument from a stakeholder or who may also be an interesting source of information.

34 For illustrative purposes, see publications by Daniel Guégen on the subject of comitology which have urged lobbyists since the middle of the last decade to make effective use of the procedure.

The fact that the institutional boundaries between the comitology committees and expert groups can, in reality, be somewhat blurred and fluid also helps interest representatives to access comitology committees. The powers of these two groups and their configuration appear on the surface to be quite distinct. Unlike the decision-making powers of the comitology committees, expert groups are advisory bodies, even when involved, by virtue of the post-Lisbon comitology reform, in the preparation of delegated acts. Still, various aspects have led to a strong alignment in the way both groups work. It is not uncommon for the composition of both groups to be relatively similar, in particular with officials sitting on both groups with different statuses. Private stakeholders forming part of expert groups may also be invited, for various reasons, to join comitology committees. Furthermore, the strategic nature of the work carried out by expert groups has been progressively recognised, firstly and, in certain cases, for quite some time by private stakeholders involved in the groups, and later by Member States, particularly in light of the 2009 reform. By way of illustration, the French Senate expressed concern in the 2014 Sutour report over the role played by expert groups in drawing up delegated acts, highlighting that they were not exclusively comprised of national officials and that therefore they had less legitimacy in co-producing delegated legislation with the Commission (Sénat, 2014). Together with the Austrian Bundesrat, they called on the European administration to align the composition and workings of the expert groups with the comitology committees in order to give Member States the same powers.

If Member States, like interest groups, consider and entrust comitology to be a strategic forum for defending their positions, this is also because of how it is used by the Commission. This use is decisive if the workings of both bodies are to be understood (Brandsma, Blom-Hansen, 2010). As demonstrated in previous works (Robert, 2012; *Politique européenne*, 2010), expert groups were privileged laboratories for Commission initiatives before becoming involved in the work on delegated acts. This enabled the Commission to gather essential expertise but also to test and, potentially justify, the acceptability of its proposals. In this regard, as in comitology as a whole, the Commission is able to benefit from its central position within the institutions, which gives it considerable powers as regards the day-to-day management of the groups (agenda, moderation, secretariat, production and dissemination of information). Furthermore, it is the only party that has a seat on all bodies, thus allowing it to have a complete overview of proceedings and to organise how they interrelate. The way the Commission moderates these groups and committees is part of what makes the matter of accessing them a political issue.

Even though the positions of the various participants are guided by political considerations – values and interests – what are the principles that structure how those considerations are brought together? What are the collectively accepted criteria that enable a compromise to be identified? Without entering into the details of the negotiations, it is important to highlight that discussions in both the expert groups and comitology committees do not resemble a scientific colloquium. The discussions not only involve identifying the best technical response but also agreeing on a political solution. **In other words, a solution is sought that is evaluated in terms of its social, political, economic and environmental impact and in terms of the support it would receive from the group and from the outside world.** The role of those bodies in the decision-making process (the fact that their decisions must be voted on by the Member States in the case of the comitology committees and may be vetoed by the Parliament or Council in the case of expert groups) is indirect but decisive for deliberations in comitology. These deliberations take place ‘in the shadow of the vote’.

Even if the process does not formally take place (comitology committees) or is simply a matter of anticipating the potential positions of the co-legislators (expert groups) or the lobbying of certain industry sectors, the ability for a possible solution to garner sufficient support to ‘pass’ and be adopted without being vetoed or too strongly opposed becomes an essential criterion. This is particularly the case for the Commission, which seeks to avoid situations in which its proposals are rejected, and likewise for other participants who know that defending a position of their own can either be very costly or exceptionally lucrative, including in terms of political and media attention. **Just as much as scientific arguments, it is therefore the balance of power and the ability of different protagonists to build alliances within the group and convince the outside world to support them that influences the work of the committees and turns them into a place where political views come together.**

The strategies of the different stakeholders in the committees has a decisive but nonetheless varying influence on the final legislation adopted. Furthermore, various factors are at play in this process, some of which bypass at least partially the members of the groups, e.g. national political circumstances, the positions of the Commission and Parliament, media coverage and citizen engagement. Nevertheless, active participation in a group, i.e. not only having a seat on the group but also having the technical and institutional expertise needed to speak out in the group, is an important resource for influencing the discussions. Various political advisors, for example, have said as much with regard to cases in which they have been able to modify the Commission’s proposal, sometimes even before it has been officially sent to the European Parliament. Such situations remain exceptional, particularly as they imply an initial balance of power that is not too disadvantageous and that the stakeholders concerned have at least the same level of technical and legal expertise regarding the subject matter in question as the representatives of the Commission and Member States who are most closely involved. This is also why the composition of the expert groups and comitology committees – if not able to ‘predict’ its direction or, even less so, how it will vote – is a major challenge in terms of how comitology works.

II.3. COMITOLGY MADE POLITICAL DUE TO ITS USE OF EXPERTISE: THE INSTRUMENTALISATION OF EXPERT OPINION TO MOUNT A POLITICAL CHALLENGE

The process for identifying and selecting experts varies between comitology committees that decide on implementing acts, and expert groups that include a task force consulted when delegated acts are under preparation. As already stated, the boundaries between the comitology committees and governmental expert groups are sometimes blurred and some of the remarks applying to the latter can apply to the former. Nevertheless, the focus of this report is on expert groups that have, for over a decade,

increasingly attracted the attention of NGOs,³⁵ the Parliament³⁶ and more recently the European Ombudsman³⁷.

Among the questions raised by those different parties, four main areas of focus stand out. The first relates to the role of officials from national administrations ('government' experts) within those bodies. As stated earlier, the 'new' role that delegated acts have given to those officials has led to Member States calling for them to be systematically present and involved in the preparation of those acts (Sénat, 2014). Under the Interinstitutional Agreement on Better Law-Making, the Commission therefore undertook to systematically consult Member State experts, including on draft laws, in the same way as the Council and Parliament. In reality, officials from national administrations are the group that are best represented in expert groups (they hold approximately 70% of the 25,000 seats available in the 830 expert groups analysed in the 2015 report by the Parliament, as compared to 22% of seats occupied by experts representing organisations and 6% by experts appointed in their own name).

This reality is more complex than it seems. On the one hand, even in groups consisting exclusively of government members, there can be private sector experts present who have either been invited by the Commission to give a one-off presentation or requested by a Member State to take the place of their representatives. On the other hand, we have seen that, even if all Member States have the same number of seats formally, they do not necessarily participate equally. Their presence and the capacity of their officials to contribute actively to the discussions depends on the human resources of the national administrations and the priorities of the Ministries, which vary depending on the sector or subject matter (Fernandez Pasarin, 2016; Robert, 2016). In other words, depending on the resources available to Member States and the resources they choose to dedicate to expert groups, some may have more influence than others over the preparation of delegated acts.

A second challenge that has really come to the fore in recent years relates to the pluralism of expertise. The need to promote European expertise that is 'socially robust', taking into account the range of existing knowledge and opinions, including 'citizen's knowledge' and 'layman's knowledge', was an objective highlighted from the early 2000s in the White Paper on European Governance³⁸. However, in practice, this commitment seems to have mostly translated into closer involvement from stakeholders in building expertise, coming in particular from parties representing industrial and commercial interests. NGOs, Parliament and the European Ombudsman have all defended the need for more balanced representation between economic and non-economic interests in the wake of data showing that economic interests were dominating over non-economic interests.

35 In 2008, the Corporate Europe Observatory became the first NGO to produce reports on this issue, some of which later involved Friends of the Earth and other organisations that are part of the Alter EU coalition. The last two reports from 2017 focused on expert groups involved in legislation on motor vehicles and European Central Bank (ECB) expert groups.

36 Notably, Parliament twice (in 2012 and 2014) voted to refuse giving discharge to the budget for expert groups, later making the renewal of the affected budget line subject to conditions. The conditions concerned the composition of the groups (offset in favour of non-economic interests) and how to manage conflicts of interest among experts, in particular those appointed 'in a personal capacity'. In 2015, following a second vote, the Committee on Budgetary Control also commissioned a study on the groups (European Parliament, 2015).

37 The European Ombudsman conducted an initial investigation on its own initiative in 2014 and launched a public consultation in 2014 at the same time as a specific investigation into the DG AGRI groups. Based on the outcomes of the consultation, it published a series of recommendations in 2015 and delivered its final opinion on 14 November 2017 following the Commission's reform in 2016.

38 European Governance, A White Paper, COM(2001) 428 final, 25 July 2001.

An analysis of the expert groups carried out in 2013 (Chalmers, 2013) showed, for example, that industrial and commercial federations occupied more than half of the expert seats offered to organisations – with a further 11% occupied by businesses themselves – as compared to 20% occupied by NGOs and 9% by unions. According to the study, only two Directorate-Generals (DGs) organised expert groups that were more open to unions and NGOs than the private sector, namely the Directorate-General for Regional and Urban Policy (DG REGIO) and the Directorate-General for Education and Culture (DG EAC). A report commissioned by the Parliament (in 2015) stressed that the situation was not particularly conducive to balance given that two years later, i.e. by 2015, the total number of expert groups with a net imbalance in favour of economic interests had increased. Over the same period, the number of seats occupied by NGOs had fallen by 10%, while the number of seats occupied by business had increased by more than 5%, and the number of seats occupied by associations had increased by more than 23% ('associations' being a status that many organisations representing industrial interests register under)³⁹.

More specific studies focusing on certain DGs or certain expert groups are undoubtedly what best capture the way in which different interests are represented across expert groups and, therefore, in the development of comitology acts. Although the limited scope of this study does not allow for an analysis of all cases, two examples can be cited.

The first is an old example that concerns the expert group on data protection proposed by the Commission, which was lobbied heavily by national data protection authorities, at a time when national data protection authorities were strongly opposed to US legislation and the practices of US economic operators in this area. The above-mentioned authorities were then outraged to discover that four of the five experts in the group were from US law firms. This called into question the group's ability to produce objective, balanced opinions.

The second example is more recent and concerns the presence of the car industry in expert groups. As illustrated in the study by Corporate Europe Observatory and Friends of the Earth, itself based on a report by the Parliament on 'Dieselgate' (European Parliament, 2017), the approach kick-started at the beginning of the last decade under the banner of 'Better Regulation', led the Commission to closely involve car manufacturers in the development of legislation affecting them, in particular through high-level expert groups. The environmental ambitions that were announced and sometimes incorporated into legislation were consequently revised downwards through delays to the preparation of implementing laws or changes (timetables, practical arrangements) very often to the benefit of industry.

39 However, the meaning of the latter category is ambiguous in terms of the economic/non-economic interest criterion, as it covers both types of organisation. Generally speaking, the data on the groups and their composition available via the register published online by the Commission poses various methodological problems related to the reliability and incompleteness of the data and the difficulty in using that data, particularly regarding the balance and pluralism criterion. One of the demands that has been made for over a decade in relation to these groups is about data quality.

Two other complementary concerns have come to light concerning the appointment of members to expert groups. **First, concerns have been raised about the ‘representativeness’ of expert group members.** Some are designated by the Commission to ‘represent’ a sector of activity, a broader interest, but without this status being supported by a mandate or without even consulting those being ‘represented’. In more general terms, these experts are often described as ‘representative’, without being able to act as such and, in particular, without being able to claim legitimacy to do so. The Commission is thus able to claim that it has involved certain sectors, interests, institutions or Member States in the discussions, even claiming to have obtained their agreement, even though the experts in question might not be empowered to speak on behalf of those groups and/or institutions (Robert, 2013). With groups working in this manner, this raises the issue of the responsibility of those experts for expertise described as ‘representative’.

Second, it is necessary to consider the potential conflicts of interest that expertise may be prone to. Doubts exist in relation to experts appointed ‘in a personal capacity’ who are deemed to be acting according to their single remit within the groups and, more generally, in the agencies (such as the European Food Safety Authority (EFSA), Consumer, Health and Food Executive Agency (CHAFAEA), European Chemicals Agency (ECHA), etc.). Those doubts concern the ability of the above-mentioned experts to provide impartial advice despite their links – on account of their professional background – with the industries concerned by their expertise, and ultimately by European legislation. Since the end of the last decade, such topics have increasingly attracted the attention of NGOs (Corporate Europe Observatory, 2013, 2017) and journalists (Horel, 2015) and have been reported by MEPs. For example, Parliament has called on EFSA each year since 2013 to require that newly appointed experts have no financial link or interest (such as research funding) with the industries and organisations covered by legislation during the two years prior to their appointment⁴⁰.

The criticism directed at expertise and the difficulties experienced by the parties involved - notably the institutions - in responding to that criticism, highlights the political side to expertise and the need for it to be taken seriously. The over-representation of industrial and commercial interests in the composition of expert groups, the high proportion of agency experts that have a professional association with the regulated sectors of industry either before or after their work as an expert, and the frequent use of studies and data produced by such sectors in order to build European expertise are due to two main factors (Robert, 2013). The first concerns the prevailing view of expertise, in particular at the Commission, which is to associate it with economic stakeholders, in particular manufacturers of materials and substances. This is an aspect that warrants further examination. From the beginning of the 2000s, calls to incorporate other forms of knowledge, in particular ‘layman’s knowledge’, into the process of building expertise ran up against the idea that independence and competence were contradictory and that it was pointless, if not counter-productive, to consider expertise separately from the interests of that expertise.

40 European Parliament Decision of 27 April 2017 on discharge in respect of the implementation of the budget of the European Food Safety Authority for the financial year 2015 (2016/2174(DEC)).

There would therefore appear to be a ‘bias of reason’ or a competence bias benefitting industrial and commercial stakeholders and, in particular, those who have long been in contact with the DGs concerned. This is reinforced by another factor, namely the considerable resource disparity between economic and non-economic interests. As a number of NGOs and organisations defending public interests have pointed out⁴¹, **consultation by means of expertise is a process that favours those with the most human and financial resources.** Indeed, resources are needed to be able to respond to calls for nominations, as introduced progressively from 2010 and carried out systematically following the 2016 reform⁴².

Although it is possible to apply a stricter policy concerning the requirement for balance in group configurations⁴³, this can only be partially achieved. New developments and a number of studies in the field of sociology of science have highlighted in recent years how economic, political and institutional constraints are not only felt at the time experts are chosen but throughout the knowledge-building process. In other words, science is not born in an ivory tower but in a social, economic and political context that determines in various ways the knowledge and expertise potentially used to explain a decision. At the most basic level, economic logic helps to define the subject matter of scientific studies and how to research it. Ways of funding research and accessing data (particularly data produced by industry) are powerful vectors structuring scientific research. In certain areas, such as GMOs or financial products⁴⁴, this logic can result in industry having a monopoly on expertise or in a lack of secondary expertise.

In a similar vein, the ‘Monsanto papers’ case and, in particular, the phenomenon of ghost writers⁴⁵ showed just how far it is possible to penetrate the academic universe. Finally, the legal context also has an effect on the development of knowledge. For example, as A. Martin (2016) pointed out, ‘European rules for building knowledge on the harmful nature of plant protection products’, passed on from the OECD, are contributing to a growth in ignorance regarding the effects of these substances. This is due to the fact that, on the one hand, the criteria for harmfulness are incomplete and an exemption from them is possible and, on the other hand, only one in three substance categories are assessed in terms of their harmfulness.

The context also influences how certain work is given recognition and publicity over other work. Early work on the tobacco industry carried out by American historian Robert N. Proctor showed how information that was essential for decision-making – namely the effects of tobacco on health and consumers – could be left out of public discussions (Proctor, 1995). These initial results fed into a series of lawsuits against the tobacco industry and a research stream looking into the social processes involved in building ignorance (otherwise known as ‘agnotology’). These processes also include all strategies aimed at creating doubt, casting discredit, influencing legitimacy, types of knowledge and/or expertise, according to economic and/or political objectives.

41 Notably during the consultation organised by the European Ombudsman in 2014.

42 Commission Decision of 30 May 2016 establishing horizontal rules on the creation and operation of Commission expert groups (C(2016) 3301 final, 30.5.2016).

43 However, during its most recent reform in 2016, the Commission stated that it could not introduce binding criteria regarding the composition of groups.

44 In the midst of the financial crisis, after MEPs observed that secondary expertise on derivatives did not exist outside of the expertise provided by the financial industry, the latter set up the NGO, Finance Watch.

45 Whereby the industry produced theses aimed at proving that glyphosate was safe, which were subsequently signed by members of academia and published in scientific journals.

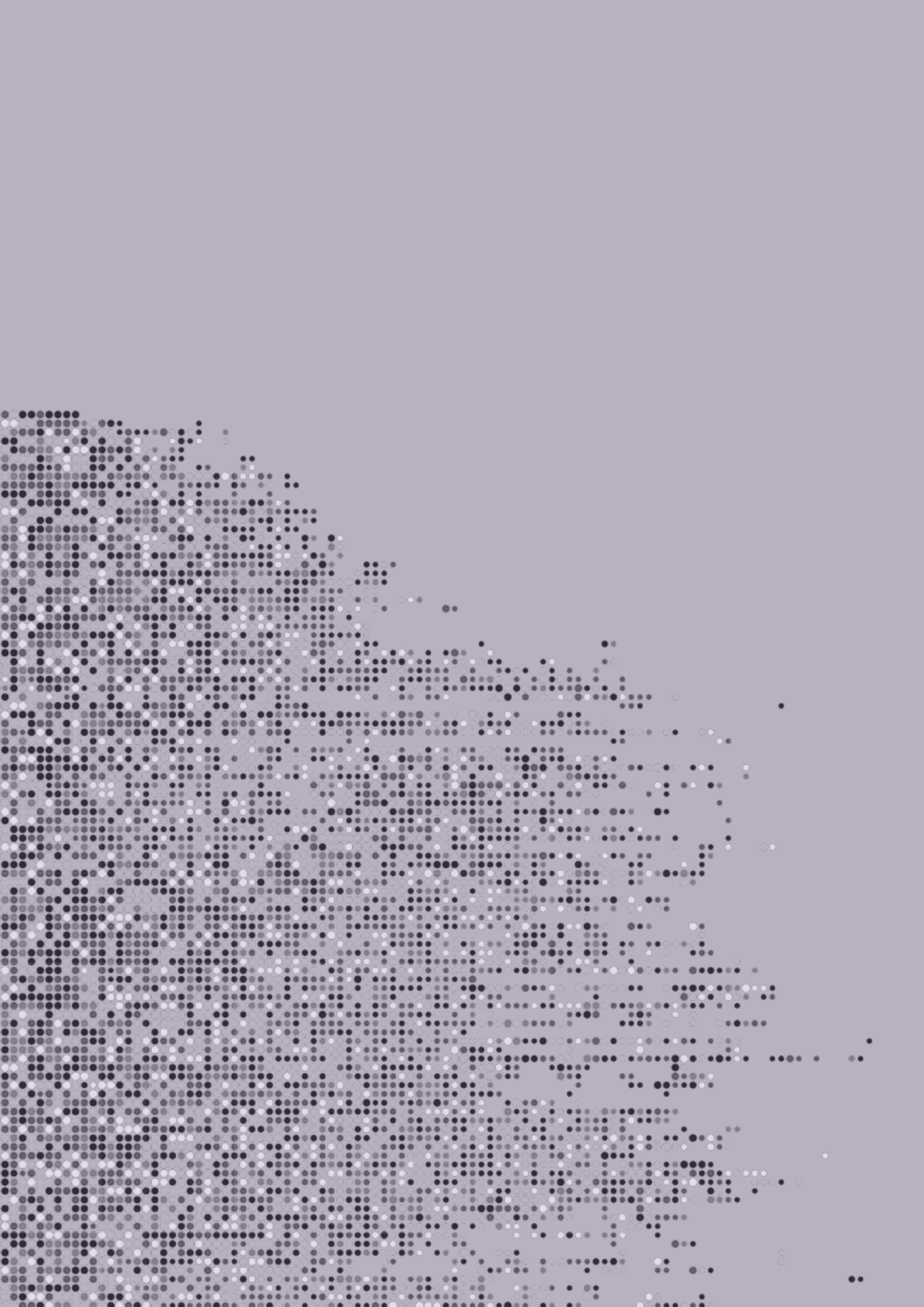
In the USA, critics of work demonstrating global warming and its probable effects have cast doubt on its scientific quality, presenting it as ‘fake science’ (Conway, Oreskes, 2011). From certain perspectives, recent criticism at European level of pro-environmentalist action has been inspired by these disqualifying strategies. Calls to ban certain substances have been described as resisting science and progress, preferring populism to reason and manipulating public opinion. For example, this was how the European Seed Association (ESA)⁴⁶ and lobbyists such as Daniel Guégen⁴⁷ criticised calls to ban glyphosate over the last two years, and defended the current functioning of comitology and the role of expert groups and health agencies such as ECHA and EFSA within the comitology process.

46 <https://www.euroseeds.eu/eu-must-not-change-comitology-system-detriment-innovation-and-single-market>

47 ‘Should decision-making be rational or emotional? Can we really allow the man in the street to take primacy over the official authorities tasked with assisting the EU Institutions? Glyphosate, GMOs, neonicotinoids, endocrine disruptors...by letting opinion trump science, we are in danger of sliding out of the 21st century and back to the era of kerosene lamps.’ (<https://danielguegen.blogactiv.eu/2017/06/21/one-million-signatures-against-glyphosate/>).



The consequences of growing
technicalisation for democratic
decision-making



The political dimension of comitology has become evident. Not only are there political challenges from the beginning of the process to the end – from the initial knowledge-building and the choice of procedure to the decision itself – but the consequences of the decisions taken in these bodies are also completely political given that they have a significant (and potentially differing) impact for Europeans. What are the effects of this growing technicalisation of policy on public policies and on democracy at a European level?

The theory put forward in this report is this: in passing decisions over to experts by labelling them as technical, they do not become less political but, on the contrary, circumvent democratic discussion and oversight. This has been illustrated by some of the cases referred to above. By categorising challenges and questions as technical and treating them as such, this short-circuits public and political debate in Parliament, as well as in the press and public opinion. This in turn has consequences in terms of the quality of expertise and the confidence that Europeans have in it.

III.1. WHAT IS THE ROLE OF THE EUROPEAN PARLIAMENT IN COMITOLOGY?

An initial effect of the growing technicalisation of policy concerns the role given to Parliament within the workings of comitology. Parliament's role is specified in Articles 290 and 291 TFEU, which defines inter-institutional agreements and the internal rules of the institutions. It also depends on the specific conditions in which parliamentary and committee proceedings are carried out and the resources available to them for participating in this process. Our initial observations and the evidence we have gathered reveal how the growing technicalisation and use of expertise in comitology have limited Parliament's room for manoeuvre and ability to take action in a number of ways. In particular, they have made it more difficult for representatives of Parliament to access and effectively participate in the development of delegated legislation.

It should be emphasised that the laws setting out Parliament's involvement in comitology proceedings only formally grant a right of scrutiny in the case of implementing acts⁴⁸ or veto in the case of delegated acts. In other words, they say nothing about the potential ways of involving different parliamentary stakeholders in the actual formulation of laws. The ways in which the rights of scrutiny and veto may be used to monitor and oversee work on the development of acts and even contribute directly to that work are laid down in framework agreements between the Parliament and Commission, Parliament's Rules of Procedure and the procedures in place for each parliamentary committee. They depend more directly on the ability of the European Parliament to access information on time, to produce contributions that may influence the debate, where appropriate, and to create a sufficient balance of power so that the other institutions take its proposals into account. Parliament's involvement therefore depends on its own resources but also on the specific way comitology works. This brings us back to the two aspects that, in our opinion, play a particularly decisive role in this regard.

48 As stated by the Commission in its 2016 report: 'Both legislators must be properly and continuously informed of committee proceedings through the Comitology Register. The legislators have a right of scrutiny over draft implementing acts based on acts adopted under the ordinary legislative procedure. This means that at any stage of the procedure they can indicate to the Commission that the draft exceeds the implementing powers provided in the basic act. In such case the Commission has to review the draft and inform the European Parliament and the Council whether it intends to maintain, amend or withdraw it. The two main differences here in relation to the situation before are that there is no fixed scrutiny period any longer and that now the scrutiny right also applies to the Council' (Commission, 2016).

The first relates to containment. Despite the recent measures taken for the purposes of transparency (such as the creation of a register of delegated acts linked to the register of expert groups allowing the composition of the groups and the minutes of their meetings to be accessed; and modifications to the Comitology Register to allow access to different committee working documents), the way that the committees and expert groups work is based on the principle of discussions held outside the public domain, to which access is limited, including access by the co-legislators. This containment is justified in particular by the fact that the discussions are purely or predominantly technical, therefore involving no political responsibility, and are aimed at producing an expert opinion. For the latter reason, a form of confidentiality – to a more or less significant degree – is required to enable views to be freely exchanged and to avoid experts being pressured.

Although measures are still under discussion as part of the comitology reform proposed by the Commission in 2017 regarding the possibility of granting access to committee members' final votes, containment will remain an important characteristic of the way these bodies work. However, this is not without consequences for MEPs. The first consequence concerns access to information. The interviews we conducted, internal parliamentary documents and the 2013 Parliament report on comitology⁴⁹ all mentioned the considerable difficulties encountered by MEPs, their colleagues and Parliament administrators in following the work of the committees and groups. They mentioned, for example, failure to comply with deadlines for providing information, incomplete minutes, cases where members of the Commission have refused to attend comitology monitoring groups within parliamentary committees, and the requirement for certain working documents to remain confidential, about which outside expertise is hence impossible to obtain.

These aspects are a hindrance to the right of scrutiny being exercised effectively and, above all, to the possibility of taking action when laws are drawn up. Consequently, they also prevent real dialogue between Parliament and the expert bodies. In addition, MEPs also have considerable difficulty accessing expert groups. Although the bodies involved in preparing delegated acts are – unlike the comitology committees – theoretically open to Parliament as a co-legislator, its involvement is heavily restricted. Its participation is not greatly encouraged (meeting dates do not fit in with and can even clash with the timetable of the Parliament), the inter-institutional agreement provides that participation only applies to Parliament administrators (although some exceptions may be negotiated on a case-by-case basis), and, at any rate, MEPs may only observe and may not express their opinions or participate actively in the discussions. This all prevents MEPs and their institution from exercising their rights under comitology. In contrast, the cases we were given to study in which Parliament appeared to have influenced delegated legislation show that the possibility of following and reporting on negotiations in real time, to understand the challenges and, in particular, to decipher the possible power balance and alliances surrounding draft acts, and even engage indirectly in discussions, were a crucial asset in raising the concerns of the relevant Parliamentary committees with the expert groups and/or the DGs concerned.

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 49 European Parliament (2013), Report on follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers (2012/2323(INI)), Committee on Legal Affairs, Rapporteur: József Szájer, 4.12.2013.

A second aspect of the way comitology works that can hinder Parliament's participation concerns the role of expertise, i.e. having strong specialist knowledge. According to the evidence we have gathered, the expertise drawn on in comitology is dual-faceted. Expertise encompasses the subjects under discussion (e.g. the harmfulness of substances and measurement methods, production processes, market structure) and the comitology procedures themselves (understanding the decision-making process and acting at the right time, knowing how to argue an objection, etc.). Our observations have also shown that a strong grasp of this dual expertise is essential to be able to follow the discussions and participate in them effectively. A weaker grasp of this technical and procedural knowledge exposes those involved to two additional risks. The first is the risk of participating 'in vain' without making any effective contribution⁵⁰. The second is that of being more easily inclined to follow the suggestions of others, including interest representatives⁵¹, without necessarily being able to understand the priorities underlying their positions or votes. Finally, previous studies have shown that expertise and the ability to play an active role in a group increase with experience, thus benefiting the national officials who are regularly involved in such bodies, and those who have been for some time, over participants sent on a more sporadic or rotating basis.

This highlights the challenges facing the European Parliament following the new comitology procedures introduced with the Lisbon Treaty. Those challenges were brought about in part by the changes that occurred. Most committees are now structured in such a way as to ensure close monitoring of comitology through specific working groups. The Secretariat has also had to mobilise new resources in order to meet the need for comitology expertise, notably of a legal and procedural nature. However, the use of expertise and the growing technicalisation of comitology also impact more fundamentally on the work of the Parliament, putting that work to the test. These two aspects limit the ability of MEPs to follow and make sense of the work of the committees, to prompt discussion or debate and to inform their colleagues. Beyond this, in terms of the challenges of secondary legislation, it also limits their ability to structure themselves so as to be able to actively contribute to and, where appropriate, reject proposals that would appear to be in contradiction to basic acts.

III.3. LEGITIMACY OF EUROPEAN DECISIONS AND EXPERTISE AT RISK FROM COMITOLOGY

There are a number of challenges for public policy and for democracy at the European level posed by handling topics with a political dimension within a framework such as comitology.

First, by entrusting bodies such as those set up under comitology – which are characterised by their technical discussions and contained environment – to handle large swathes of decisions and, in certain cases, to handle the most sensitive and contentious aspects of decisions, **this limits the ability of the public to understand those challenges, to discuss them and to voice their concerns.** These bodies

50 There is various evidence to suggest that a significant proportion of national officials participate very little in the discussions in these bodies as they have an insufficient understanding of the technical challenges and arguments or the working language. This backs up the observations gathered as part of a previous study examining governmental expert groups (Robert, 2016).

51 This concern relating to the difference between the expertise needed to follow the discussions and the actual expertise of MEPs, and its impact on their receptiveness to lobbyists' arguments, was mentioned in particular during interviews.

are reported on by the media thanks to strong lobbying by NGOs and the Parliament on certain sensitive topics such as GMOs, glyphosate and 'Dieselgate'. However, very little is known or understood about those bodies, whether in terms of the challenges they address, the positions they defend regarding those challenges or the way in which decisions are taken.

The transparency measures that have been adopted in recent years or that are being planned will not rectify this situation. The registers are very rarely consulted by ordinary members of the public. It is predominantly those with a professional interest in following the discussions and with sufficient resources to consult the registers who do so. The above-mentioned measures should therefore mostly benefit stakeholders and interest representatives (Robert, 2018). Whether comitology discussions are followed by the national press very much depends on the subject covered. Still, little is known about many aspects of secondary legislation, which political stakeholders rarely report about. Regarding the Commission's proposal from 2017 and, in particular, the proposal to publish how different Member States vote, this transparency could, in certain cases, lead to national representatives clarifying their decisions publicly. This would be an important initial step towards recognising the political responsibility tied to comitology. However, besides the fact that the proposal does not apply to members of governmental expert groups, let alone stakeholders, this proposal alone will not be enough to make decisions easier for the public to understand or to allow the public to make itself heard.

Second, while comitology helps to keep important issues out of the public and political eye, it also builds a special link with expertise within the decision-making process. The fact that decisions are being categorised as purely technical and are having to be dictated by expertise seems to go hand in hand with a form of deference to expertise, in particular expertise provided by health agencies. For example, **as the Standing Committee on the Food Chain and Animal Health has never managed to obtain a qualified majority either for or against decisions in relation to GMO authorisations, the Commission has systematically followed the opinion of EFSA, despite not being bound to do so by law** (Weimer, 2015; Weimer, Pisani, 2016). In more general terms, by failing to recognise the political nature of the decisions in question – in terms of their consequences and decision-making criteria – this is making expertise responsible for more than it is able to resolve. This stems from the fact that expertise is being called upon for an answer to questions for which it has no answer – for example, the balance between social and environmental costs or the choice between two farming models. By resorting to expertise in this way, scientific input becomes responsible for the entire legitimacy of decisions at a time when, for this reason in particular, it is becoming more and more controversial.

Third, the way in which comitology currently works is fuelling a two-fold crisis of confidence, namely in expertise and, more broadly, in the institutions. Expertise is tending to be used as a smokescreen and as an authoritative argument, i.e. expertise alone is what will make the decision and that decision should not be questioned. Lobbying on the issue of glyphosate, GMOs or endocrine disruptors has been assimilated by their political adversaries into populist and irrational positions that are based on emotion and are hostile towards science. Using expertise in this way can, in turn, fuel defiance towards science and its authors, who are regarded as Trojan Horses for particular interests and/or political projects without making any open declaration.

By contrast, in more general terms, events that bring comitology onto the European public's radar will deepen the sense of defiance not only towards the decisions taken but also towards the way those decisions are adopted and ultimately the political system within which they reside. The cases referred to in this report concern secondary legislation where the consistency with basic acts is disputed and where backing comes from controversial expert opinions. Furthermore, where those cases have led to large-scale public mobilisation, as in the case of the European Citizens' Initiative on glyphosate, it can seem as if this mobilisation is not being reflected or is even being deliberately ignored, as was the case following the reauthorisation of glyphosate in November 2017.

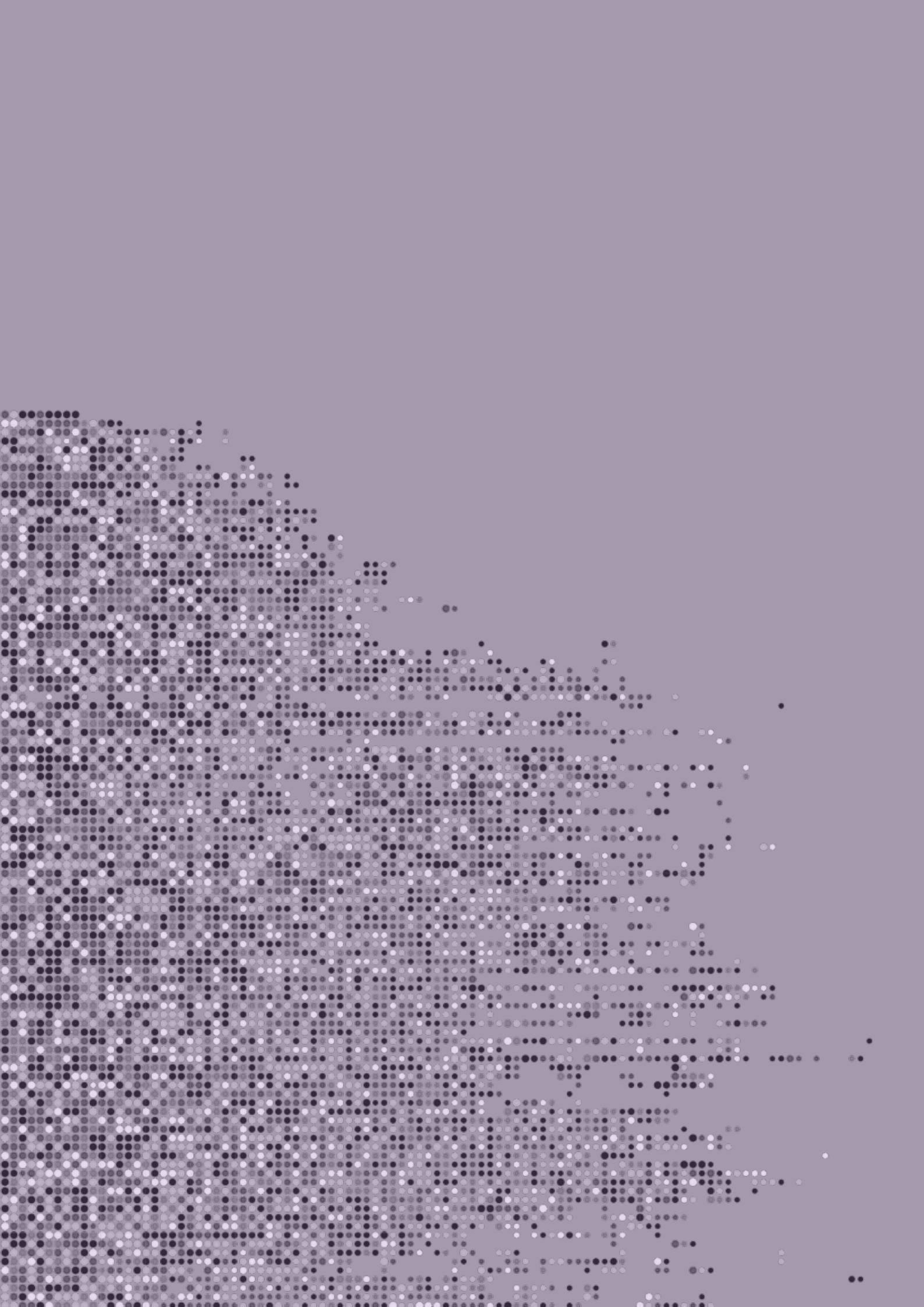
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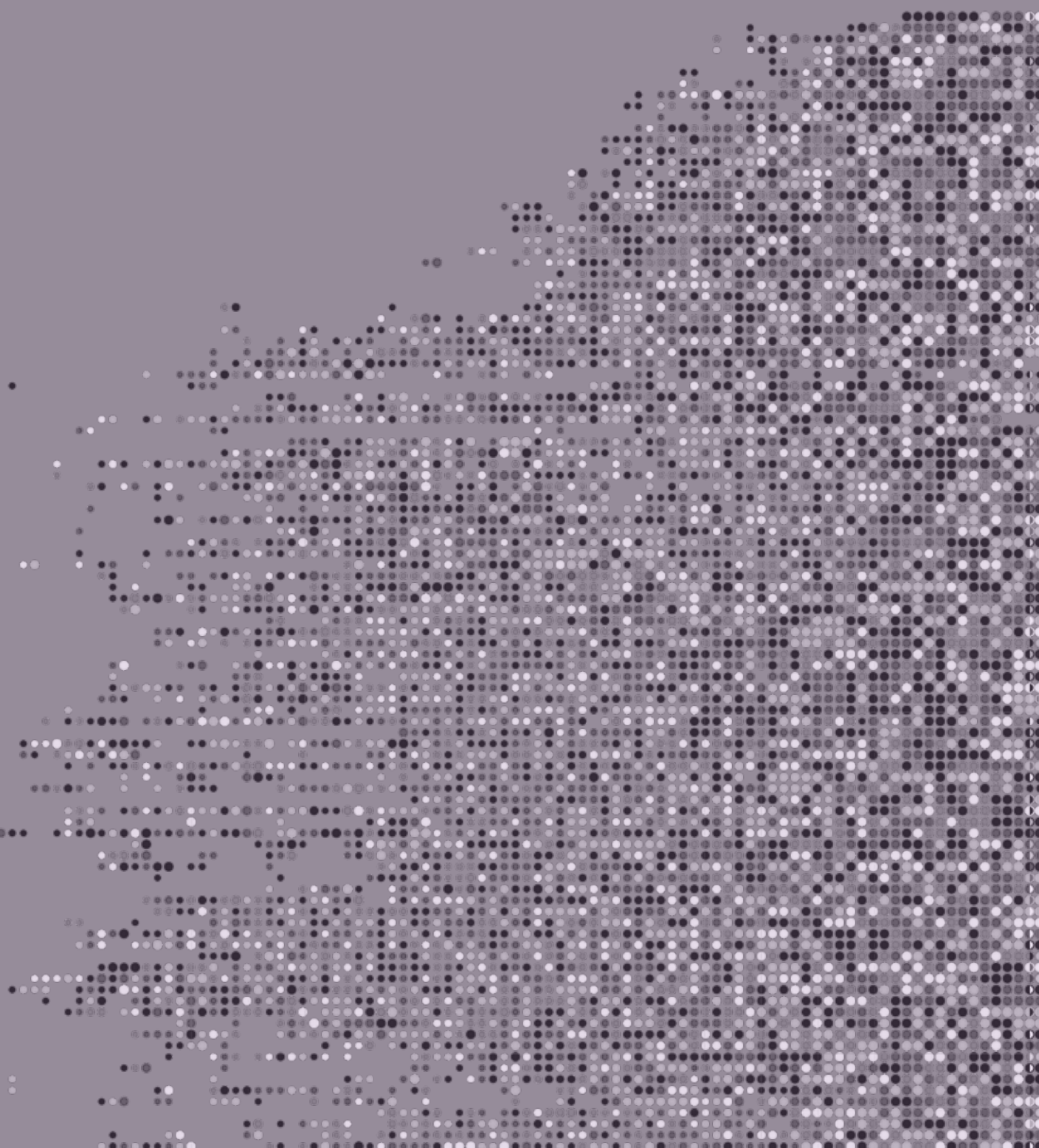
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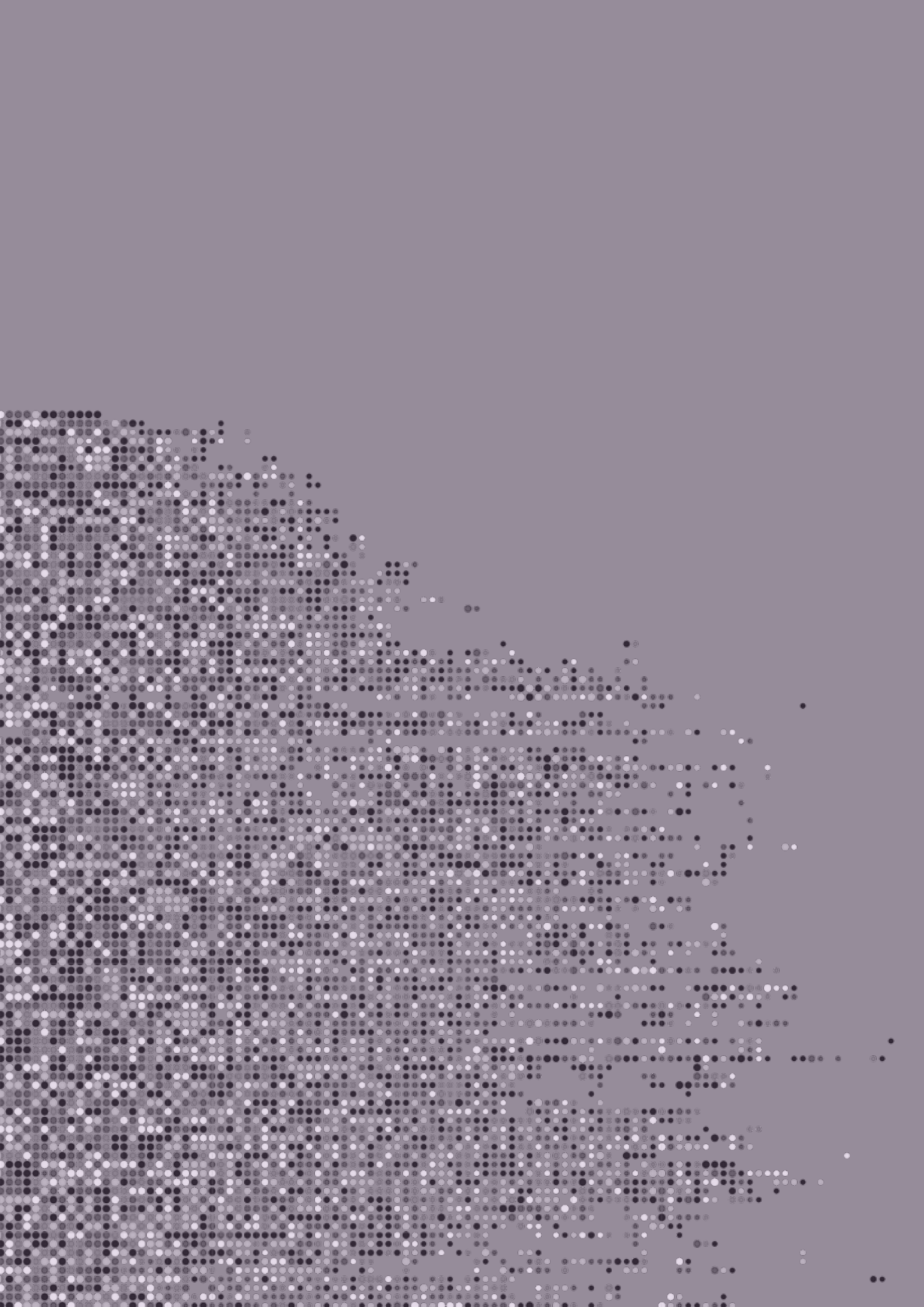
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Cécile Robert

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